

*United States Court of Appeals
for the Second Circuit*



**PETITIONER'S
BRIEF**

No. 73-1005

United States Court of Appeals
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner.

v.

CZAS PUBLISHING COMPANY, INC.,

Respondent.

On Application for Enforcement of an Order of
The National Labor Relations Board

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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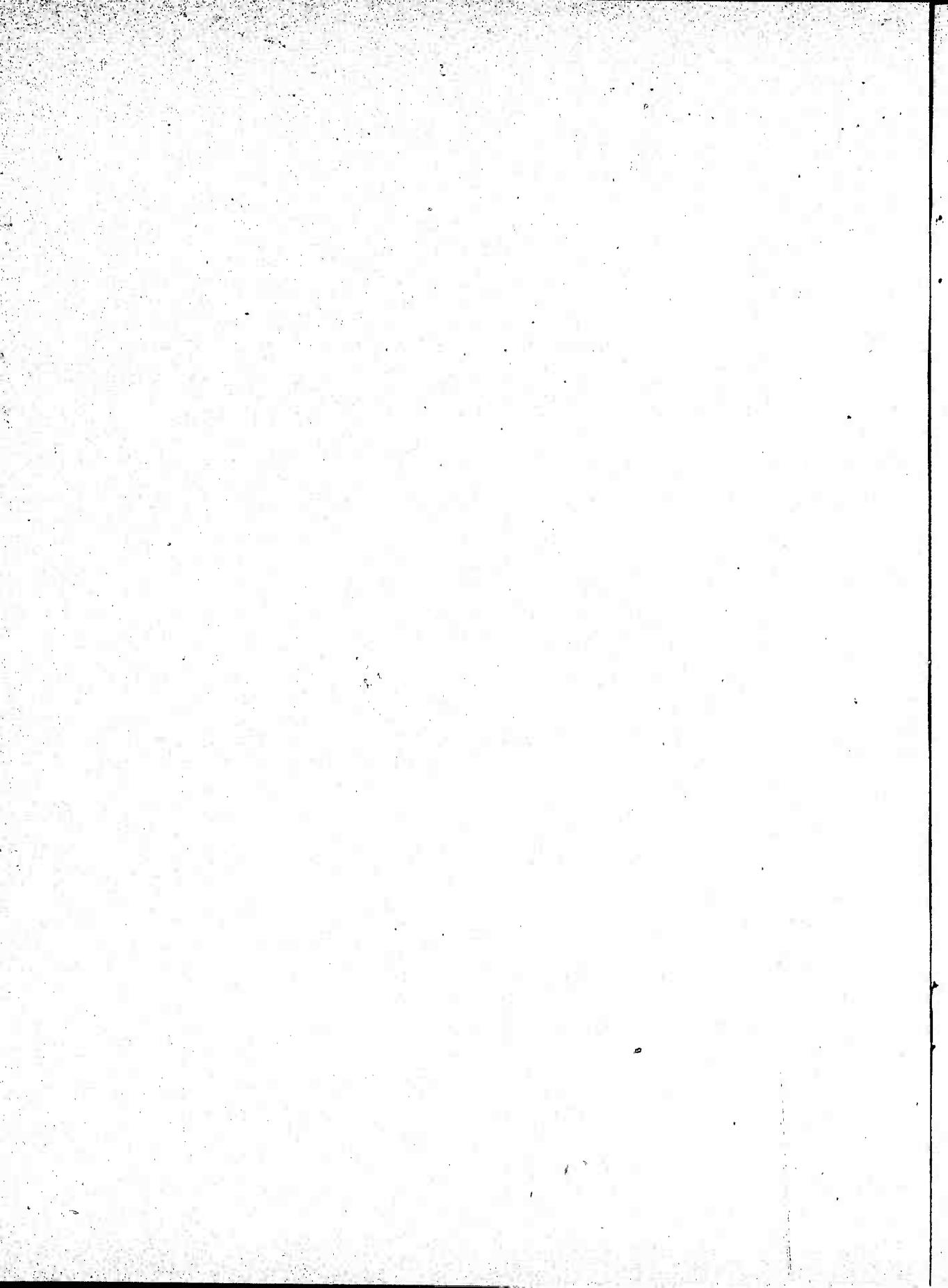
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BRIEF FOR
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STATEMENT OF ISSUES PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's findings that the Company violated Section 8(a)(1) of the Act by coercively interrogating its employees regarding their union sympathies and attempting to induce the employees to withdraw their support for the Unions by promising or granting certain benefits and by threatening plant closure and other reprisals.
2. Whether substantial evidence on the record as a whole supports the Board's findings that the Company violated Section 8(a)(3) and (1)

of the Act by discharging employee Stefan Jachemczyk, laying off employees Mieczyslaw Pajak and Adam Palka, and withholding overtime work from Palka, Pajak, and Marion Mamelko, because they engaged in union activities protected by the Act.

3. Whether substantial evidence on the record as a whole supports the Board's findings that the Company violated Section 8(a)(5) and (1) of the Act by negotiating with the Unions in bad faith, by unilaterally changing terms and conditions of employment without notice to the Unions, and by bargaining directly with employees in the unit for which the Unions are the jointly certified collective bargaining representative.

STATEMENT OF THE CASE

This case is before the Court on the application of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) for enforcement of its order against the Czas Publishing Company, Inc. (hereafter, "the Company") issued on August 23, 1973. The Board's decision and order (A. 2-63)¹ are reported at 205 NLRB No. 158. This Court has jurisdiction of the proceedings, the unfair labor practices having occurred in Brooklyn, New York.

I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that the Company violated Section 8(a)(1) of the Act through a series of coercive interrogations, promises of benefits, and threats of plant closure and other reprisals, at first carried out in

¹ "A." references are to the pages of the printed Appendix. References preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

response to a union organizing effort and, after the Unions² were jointly certified as collective bargaining representative, continued in an attempt to undermine employee support for the Unions. The Board further found that the Company violated Section 8(a)(3) of the Act by penalizing certain employees because they supported the Unions or engaged in union activities protected by the Act. In particular, the Board found that the Company had discharged employee Stefan Jachemczyk, withheld overtime work from employees Mieczyslaw Pajak, Adam Palka, and Marion Mamelko, and temporarily laid off Pajak and Palka — all because these men had engaged in union activities. Finally, the Board found that the Company had violated Section 8(a)(5) of the Act by negotiating with the Unions in bad faith, by unilaterally changing terms and conditions of employment without notice to the Unions, and by bargaining directly with employees in the certified unit. The facts upon which the Board based its conclusions are summarized below.

A. Background

The Company is a New York corporation with its principal place of business in Brooklyn, New York, where it operates a printing business. Its principal stockholder is the Polish National Alliance of Brooklyn (hereafter called PNA), a fraternal insurance society with a membership consisting of persons of Polish descent for whom the society provides insurance, mortgage loans, and certain other benefits (A. 4; 87-88). The Company has performed printing services for Columbia University and for various Polish organizations other than PNA, but its chief business has been the publication and distribution of a weekly Polish-language newspaper delivered to PNA policyholders (A. 4; 88, 201-202). PNA pays a

² New York Typographical Union #6, International Typographical Union AFL-CIO (hereafter, Typographers Local 6) and New York Printing Pressmen and Assistants' Union of North America, Local 51 (hereafter, Pressmen's Local 51).

fixed price for this service, and, in addition, absorbs deficits incurred by the Company (A. 4; 88).

The union organizing activity at the Company's plant took place in May — September 1972. The organizing effort began in May 1972, when Marion Mamelko, a pressman at the Company, contacted Pressmen's Local 51 about the possibility of unionizing the Company plant. An organizing meeting was held on May 25 at Mamelko's home, attended by representatives from Pressmen's Local 51 and Typographers Local 6, and five Company employees (A. 5; 103-104). Four of those five — Marion Mamelko, Stefan Jachemczyk, Mieczyslaw Pajak, and Adam Palka — signed Union authorization cards (A. 5 n. 8; 104, 129, 142, 176). On June 6, the Unions filed with the Board a joint petition for a representation election. The Unions won the election (held on August 23) by a vote of 4 to 3, and were certified as collective bargaining representative on September 11 (A. 6; 66-67, 74-79, 91, 127). Both the union organizing activity and resulting certification evoked considerable opposition from the Company.

B. The Company's Pre-Election Attempts to Defeat the Unions

On May 29, shortly after the union meeting at Mamelko's home, Joseph A. Glowacki, who serves as secretary and editor of the Company and as secretary-general of PNA, came to the Company plant accompanied by Leopold Malinowski, vice president of the Company and of PNA (A. 4-6; 214, 222). The employees were all summoned to the office of Kazimierz Zajac, the plant manager, and a meeting about the union organizational effort commenced (A. 6; 104-106). Glowacki told the employees he had heard that a union was being formed. He advised them to "forget about it" since the Company could not afford a union contract and "is never going to sign a union contract" (A. 6-7; 107). Malinowski then

asked the employees what they thought the union could offer them, and Glowacki questioned them as to whether they wanted a union (A. 7; 106-108). Glowacki ascertained from his interrogation that Pajak, Palka, Mamelko, and Jachemczyk supported union representation and that employees Purij and Kabat and Foreman Peter Kubicki opposed it (A. 7; 106, 130, 143, 177, 221). Zajac observed that the Company would be unable to pay union rates, and Glowacki warned that the Company would stay in business no longer than three to six months if a "contract with the union salary" were signed. Finally, Glowacki told the employees that "those who want to join the union . . . may do so, but the door is open, [and] they may go with God." (A. 7; 105, 106).

In the pre-election period, the Company directed much of its anti-union message at employee Jachemczyk who had worked for the Company as pressman and deliveryman for some twenty years (A. 9-10, 13-14, 20; 170, 188). On June 3, Plant Manager Zajac called Jachemczyk into his office and asked him if he intended to join a union; Jachemczyk told him he did intend to join. Zajac then offered him a 25-cent-per-hour raise, for which Jachemczyk thanked him (A. 9; 144). Shortly after this, on June 5, Glowicki telephoned Jachemczyk at home, promising him that if he would withdraw his support for the Unions, he could be assured of keeping his job at least as long as Glowicki was with the Company (A. 10; 144-145). A few days later, Zajac approached Jachemczyk at his work station and offered to raise his pressman's wages to the higher rate paid Mamelko and to increase his overall earnings by giving him additional mailing and delivery work; the offer was conditioned on Jachemczyk's withdrawing his union "application." Jachemczyk, given an hour to "think [it] over," finally went up to Zajac's office to refuse the offer. If he withdrew his support from the Unions, he told Zajac, the wives and children of his fellow workers would "spit on me." Despite the refusal at this time, compensation for additional mailing and delivery work was given him as promised (A. 10; 145-49, 196).

Over the weeks that followed, Jachemczyk made a number of deliveries to Glowacki at the latter's office in PNA headquarters; on each occasion, Glowacki would promise to make Jachemczyk's wages equal to Mamelko's if Jachemczyk would withdraw his union "application." Each time Jachemczyk declined the offer (A. 10; 149-52). Finally, on August 23, the day of the election, Zajac sent Jachemczyk to see Joseph B. Brachocki, an admitted agent of the Company (A. 14; 66, 74-79), who told him to "sit down," because "we are going to talk about the Union." Brachocki suggested that if Jachemczyk threw an empty ballot into the ballot box," nobody is going to know who did it." Jachemczyk responded noncommittally: . "I going to see. I don't know what I going to do." Brachocki then observed that if the Unions lost the election, Palka would be fired, Mamelko might be fired, and Jachemczyk would be given a raise (A. 14; 152-55).

On August 18, five days before the election, Jachemczyk, along with the other three union adherents — Palka, Pajak, and Mamelko — met with Glowacki in an office at the Company plant. The four had prepared a list of "demands" regarding improved job benefits, and Mamelko read them aloud to Glowacki, telling him that the four would "withdraw from the Union" if the demands were met. Glowacki, asserting he lacked authority to decide the matter, said he would get an answer from the Company Board of Directors at the board meeting some ten days later. The employees said they could not wait that long, since the Company response would be too late to guide their choice in the election (A. 12-13; 109-10, 131-32). Glowacki once again emphasized that the Company could not afford to sign a contract with the Unions and that there would be no union in the shop (A. 12; 132).

C. The Company's Post-Election Efforts to Destroy the Unions' Majority

On the afternoon of August 23, immediately after the Unions' election victory was announced, Glowacki spoke to the assembled employees, stating that those who had voted for the Unions had "destroyed the last Polish newspaper" and warning that "you people will have to look for another job now." (A. 15; 112).³ In a statement aimed at Palka, Glowacki vowed that he would see to it that those who had left Poland "illegally" would "never be able to see their families' graves again" (A. 15; 133). After concluding his speech, Glowacki invited the plant manager, the Company counsel, the foreman, and the two anti-union employees — Kabat and Purij — to join him at a nearby bar. Excluded from the party were the employees who had signed Union cards and voted for the Unions; they had to remain at work until quitting time, a half-hour or so later (A. 15; 110-111, 133).

Plant manager Zajac returned from the restricted bar excursion to the plant that afternoon and made the following remarks to Pajak: he had never expected Pajak to vote for the Unions, he would no longer talk to Pajak or do him any favors, and he would not give him a good recommendation "in case" Pajak sought another job (A. 16; 111). He also told Pajak not to report to work until the following Monday, five days hence. On that Monday, both Pajak and Palka were told not to report for work again until the next Monday. This pattern of limiting these two pro-union employees to one day of work each week persisted until September 18 for Palka and September 20 for Pajak, when their normal

³ As noted above, the Unions won the election 4 to 3. Those voting for the Unions were the four card signers — Mamelko, Jachemczyk, Pajak, and Kabat (A. 15; 110, 133, 221).

work schedule was reinstated.⁴ None of the other employees was laid off (A. 15-18; 112-14, 133-35).

On August 28, Foreman Kubicki, who had been asked by Glowacki to inquire into Jachemczyk's and Mamelko's attitudes toward withdrawing from the Unions (to find out "what they think, these two men"), invited the two men to stop by at a local bar with him after work (A. 18; 156, 178, 212-13). There, over drinks bought by Kubicki, the foreman told them that the Board of Directors was meeting that night and that Mamelko and Jachemczyk now had a last chance to protect their interests by withdrawing from the Unions. Dispensing "personal and friendly advice," Kubicki told the two men they should worry about themselves and not about Palka, who did not like working in Brooklyn, or about Pajak who was a "good operator," in contrast to Mamelko and Jachemczyk, who lacked the competence to keep a job anywhere other than at the Company. Mamelko and Jachemczyk could stay at the Company for the rest of their lives, "and nobody fire you" if only they would withdraw from the Unions. Kubicki said he needed their answers by 7 o'clock that evening. They answered that they would "never withdraw" from the Unions; Kubicki responded, "God help you." (A. 19; 156-57, 178, 212-14).

The following morning, Jachemczyk failed to report to work. Kubicki, dispatched by Plant Manager Zajac to Jachemczyk's home to get him to come in (as had been the practice on similar occasions in the past), found the absentee lying in bed fully dressed. After rousing Jachemczyk and being promised that he would come to the plant "right away," Kubicki returned and reported to Zajac that Jachemczyk appeared to be under

⁴ These layoffs were terminated shortly after Jachemczyk filed his unfair labor practice charge against the Company, on September 15 (A. 18).

the influence of alcohol but would be in to work soon (A. 21; 180-81, 204-205). That afternoon, when it appeared Jachemczyk would not be in, Zajac, Glowacki, and Alexander J. Malewski, the Company counsel, conferred, and it was determined that Jachemczyk should be discharged. No attempt was made to reach Jachemczyk; the discharge letter was mailed that afternoon by Malewski (A. 21-22; 83, 158, 196-98).

After Kubicki's visit, Jachemczyk had gone to see a physician because he was spitting blood and experiencing chest pains. The physician administered an injection, and gave him a note to take to his employer the next day, and Jachemczyk returned home (A. 22; 182, 158).⁵ When Jachemczyk took his note to Zajac at the plant the next day, he was told to take it over to Glowacki at PNA headquarters. He did so, and Glowacki told him that no certificate by anyone other than the PNA physician could be accepted; he refused Jachemczyk's offer to see the PNA physician, explaining that Jachemczyk would in any case be receiving his discharge letter shortly (A. 22-23; 159-60). The next day, Foreman Kubicki brought the final paycheck to Jachemczyk's home and once again offered him a "last chance" to withdraw from the Union. Jachemczyk's reply came: "Mr. Kubicki . . . whatever happens, I will never withdraw from the Union." (A. 23; 163).⁶

Subsequently, the three other union adherents were denied the usual amount of overtime work during the eight weeks preceding Christmas — a period during which, in previous years, the employees had been given extra overtime work to increase their pre-holiday earnings. Pajak received no overtime

⁵ The note, dated 8/29/72, read as follows: "Steve Jachachzck [sic] has been treated for Rt. Rib pain. He was unable to work." (A. 82).

⁶ Following his discharge, Jachemczyk incurred medical expenses, including those for a one-day hospital stay, which would have been covered by the Company's health insurance plan. However, this employee benefit was terminated on Jachemczyk's discharge; he was thus not reimbursed for these medical expenses. (A. 28-29; 164-66).

work at all, Mamelko received three hours, and Palka was given seven hours. In contrast, the three employees who had opposed the Unions received, respectively, 23, 35-1/2, and 40-1/2 hours of overtime during this same period (A. 30-31; 115, 116-17, 137, 257-65).

D. The Company's Refusal to Bargain in Good Faith

Approximately a month after certification of the Unions on September 11, the Company counsel, Malewski, met with Julius Seide and Edward McGuiness, the business representatives of, respectively, Pressmen's Local 51 and Typographers' Local 6. The Union representatives described the terms of a standard union contract, and told Malewski that if the terms were too onerous for the Company to meet immediately, they could give the Company three years or more to meet them. Malewski, promising to convey the information to the Company, noted that "any final negotiations would have to be approved by PNA, because [the Company] was a subsidiary owned by the PNA." (A. 35; 93-95).

On November 14, a formal negotiating session was held; attending were the business representatives of the two Unions and Company representatives Malewski, Glowacki, Malinowski,⁷ and Zajac. Again the Unions' contract terms were described, and a three-year schedule of gradual increases leading to full contract benefits was proposed. The Company representatives said they could not meet the contract terms in three years. The Union representatives then suggested a four-year or five-year period, if necessary, with a program of small increases every six months. Company representatives said they would give a response to this proposal after presenting it to the PNA executive board (A. 35-36; 96-97).

⁷ The transcript of Seide's testimony describing this meeting inadvertently mis-identifies Malinowski as "Alenofski" (A. 96). Malinowski's name is correctly spelled elsewhere in the transcript and in the Board decision.

The second and final negotiating session was held on November 28, the day after the PNA board meeting; the representatives present were the same persons who had attended the previous session. The Company representatives announced that PNA had voted to close down the Company. Malewski and Glowacki said the work would be gradually phased out, although they gave no termination date. Because of the impending shutdown, they could negotiate no further, they stated (A. 36; 97-98). No more bargaining sessions were held, although in the course of an employee grievance meeting in January, Malewski once again told Seide the Pressmen's representative, that the plant was closing down (A. 36; 99-100).

After the final bargaining session on November 28, the Company abandoned its annual practice of giving its employees a Christmas cash bonus. In 1970 and 1971, each employee had received a \$50 bonus. Without notice to the Union or to the employees, the Company declined to give the employees any Christmas bonus in 1972 (A. 37; 135-36).

In January there began a series of encounters and meetings leading to execution of a contract between the Company and its employees without the participation of the Unions. On January 3, 1973, Glowacki stopped by the Company plant to apologize for not coming over before Christmas to wish the employees a happy new year. He again advised them to forget about the Unions since the Company would never, he said, sign a union contract. He suggested, however, that he and the employees could "still sit down by the table . . . talk it over, [and] . . . settle the matter by ourselves." (A. 37; 119). When Mamelko asked if Jachemczyk could be rehired, Glowacki replied: "It may be arranged. It's possible." (A. 37; 138).

On January 30, 1973, Mamelko and Jachemczyk met with Glowacki at PNA headquarters; also present was the Company counsel, Malewski.

Glowacki told Mamelko and Jachemczyk that the Unions could get no jobs for them; the two men agreed. However, Glowacki continued, the Company had "plenty of jobs" — "five books to print" if it decided to accept the orders. Before making that decision, he said, he needed to know whether the two were going to withdraw from the Unions. Mamelko and Jachemczyk replied that they would have to consult with Pajak and Palka, the other union adherents, before giving their answer (A. 38; 167).

On February 3, 1973, Glowacki met at PNA headquarters with Jachemczyk, Mamelko, Pajak, and Palka. Glowacki again suggested settling "the matter by ourselves" and mentioned the five book orders, which he said would be accepted if the four men would "withdraw from the Union." (A. 38; 119-20, 139). Glowacki promised the employees that if they would "pull out of the union," he would give them a 15 percent raise, 10 days of annual sick leave with year-end payments for any unused leave, Blue Cross coverage paid for entirely by the Company, and time-and-a-half for hours worked in excess of 40 per week. Glowacki left the room while the four talked over the offer; when he returned, they told him they wanted to discuss it with Seide, the representative of Pressmens' Local 51 (A. 38-39; 119-22, 139-41). Glowacki responded: "Think it over, or else it's possible that Czas will be closing" He asked for an answer "as quickly as possible because time is short." (A. 39; 141). The next day Mamelko told Glowacki the employees, including former employee Jachemczyk, had decided not to withdraw from the Unions (A. 39; 121).

On February 26, 1973, Glowacki came by the plant and told Foreman Kubicki that "we must close the shop" in two or three weeks (A. 39; 208). Two days later, Kubicki told Pajak and Mamelko that something had to be done because "if the shop is closed, you have no work;

the Union will not guarantee you work, and we all losing jobs and it is very bad situation now." Pajak agreed, but said the Company would have to agree to employee demands (A. 39; 208-209). Kubicki then called Glowacki and "told him . . . the story." Glowacki indicated his willingness to look at the demands, so Kubicki asked Pajak to write down "everything on a piece of paper, what we want." Kubicki then took the list of demands prepared by Pajak in Polish (A. 84) over to Glowacki at PNA headquarters. After looking them over, Glowacki announced, "This is not bad. I agreed. I accept this story." Kubicki returned to the plant, where, about an hour later, Glowacki called to tell Kubicki that his "copy" was ready. The proposed contract, typed in both Polish and English by Glowacki's secretary, was then picked up by Kubicki and brought back to the plant. It contained eight of the ten demands on Pajak's list, and it was headed by a preamble which had not appeared on the list (A. 40-41; 81, 123, 209).⁸ Showing this contract to plant employees, Kubicki said, "Listen, everybody, before you sign, everybody agree with the contract" (A. 41; 209). Then Kubicki, Mamelko, Pajak, and Purij signed the contract, and Kubicki returned it to Glowacki at PNA headquarters (A. 41; 81, 123, 227).

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board concluded that the Company violated Section 8(a)(1) of the Act by coercively interrogating its employees, by attempting to discourage support for the Unions through the promise

⁸ The Preamble read as follows:

To the Directors of the Weekly "Czas"

After thorough consideration of the situation existing in our Corporation, we hereby request you to accept our conditions, so that the Institution, built by our forefathers, shall not close, so that many families may not lose their jobs. These conditions shall be retroactive from July 1, 1972, to July 1, 1975, a three year period.

or grant of benefits, and by threatening plant shutdown and other reprisals if its employees persisted in supporting the Unions. It further found that the Company violated Section 8(a)(3) and (1) of the Act by discharging one employee, laying off two others, and withholding overtime work from its pro-union employees because they had engaged in union and other concerted activities protected by the Act. Finally, the Board found that the Company violated Section 8(a)(5) and (1) of the Act by negotiating with the Unions in bad faith, by unilaterally changing terms and conditions of employment without notice to the Unions, and by bargaining directly with its employees (A. 49-51, 58).

The Board ordered the Company to cease and desist from engaging in the unfair labor practices found or in any other manner interfering with, restraining or coercing its employees in the exercise of their protected rights under the Act. Affirmatively, it ordered the Company to offer Stefan Jachemczyk reinstatement and make him whole for any loss of earnings suffered and for any medical expenses which would have been covered by his medical insurance had he remained a Company employee. It further ordered the Company to make whole Myczyslaw Pajak, Adam Palka, and Marion Mamelko for loss of pay suffered as a result of discrimination against them, to reinstate the practice of giving employees a Christmas bonus and make them whole for the bonus withheld in 1972, to bargain collectively with the Unions upon request (the Unions' initial certification year to run from the date on which the Company commences good-faith bargaining), and to post appropriate notices (A. 52-57, 59-63).

ARGUMENT

- I. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY COERCIVELY INTERROGATING ITS EMPLOYEES REGARDING THEIR UNION SYMPATHIES AND ATTEMPTING TO INDUCE ITS EMPLOYEES TO WITHDRAW THEIR SUPPORT FOR THE UNIONS BY PROMISING OR GRANTING CERTAIN BENEFITS AND BY THREATENING PLANT CLOSURE AND OTHER REPRISALS

As shown in the fact statement, the Company revealed its hostility toward the Unions soon after the organizational meeting in Mamelko's home; and this hostility persisted even after the Unions won the election on August 23. In short, the interrogations, promises and grants of benefits, and threats discussed below in this section were all part of the Company's campaign to defeat the Unions by inducing those employees who favored unionization to abandon their pro-union stands.

A. Interrogations

The Board found two interrogations by Company representatives to be violations of Section 8(a)(1) of the Act. The first one, the interrogation by Glowacki and Malinowski at the plant meeting on May 29 (see fact statement *supra*, pp. 4-5) was plainly coercive since according to the credited testimony of Pajak (A. 7 n. 11; 104-108), it uncovered the employees' sentiments while conveying warnings that the Company would never sign a union contract and that employees wanting a union would be best advised to leave. An interrogation thus coupled with threats of reprisal is clearly calculated to "frustrate [a] union's organization campaign." *N.L.R.B. v. L. E. Farrell Company, Inc.*, 360 F.2d 205, 207 (C.A. 2, 1966). See also *N.L.R.B. v. Rubin*, 424 F.2d 748, 751 (C.A. 2, 1970).

The second interrogation found coercive by the Board was Plant Manager Zajac's June 3 questioning of Jachemczyk's support for the Unions (*supra* p. 5). According to the standards set forth in *Bourne v. N.L.R.B.*, 332 F.2d 47, 48 (C.A. 2, 1964), for interrogations not in themselves threatening,⁹ the Board properly found this incident to be a violation of Section 8(a)(1) of the Act. It took place in Zajac's office a few days after the Company had revealed its animus against the Unions in the May 29 coercive interrogation and threats. The questioner, Plant Manager Zajac, ranked fairly high in the Company hierarchy. And, Zajac's inquiry as to whether Jachemczyk intended "to join the Union" was coupled with the grant of a 25-cent an hour wage increase when Jachemczyk indicated his support for the Unions. Thus, the interrogation clearly meets at least three of the five *Bourne* tests, which is sufficient to establish the violation. *N.L.R.B. v. Scolers, Inc.*, 466 F.2d 1289, 1291 (C.A. 2, 1972); *N.L.R.B. v. Rubin*, *supra*, 424 F.2d at 751.

B. Promises and Grants of Benefits

It is settled law that conferring benefits on employees, or promising to confer benefits, in order to discourage union adherence violates Section 8(a)(1) of the Act. *N.L.R.B. v. Exchange Parts Co.*, 375 U.S. 405,

⁹ The factors, as set forth in *Bourne, supra*, are:

- (1) The background, *i.e.* is there a history of employer hostility and discrimination?
- (2) The nature of the information sought, *e.g.* did the interrogator appear to be seeking information on which to base taking action against individual employees?
- (3) The identity of the questioner, *i.e.* how high was he in the company hierarchy?
- (4) Place and method of interrogation, *e.g.* was employee called from work to the boss's office? Was there an atmosphere of "unnatural formality"?
- (5) Truthfulness of the reply.

409-10 (1964); *N.L.R.B. v. A & S Electronic Die Corp.*, 423 F.2d 218, 220 (C.A. 2, 1970), cert. denied, 400 U.S. 833; *N.L.R.B. v. Patent Trader, Inc.* 415 F.2d 190, 199 (C.A. 2, 1969), *mod. en banc on other grounds*, 426 F.2d 791 (1970). In the present case, the Board properly found five separate violations of the Act in connection with promising or granting benefits to employees (A. 9-11, 14). Four violations arose in the course of the Company's dealings with Jachemczyk before the election: the June 3 grant by Zajac of a 25-cent-per-hour raise; a series of implied promises by Zajac and Glowacki to raise Jachemczyk's wages to equal those of Mamelko; the promise and subsequent grant of additional mailing and delivery work for Jachemczyk; and the prediction by Brachocki on the day of the election that Jachemczyk would receive a wage raise if the Unions lost. Finally, Section 8(a)(1) was clearly violated after the election, on August 28, when Foreman Kubicki held out to Jachemczyk and Mamelko the prospect of lifetime job security — a promise made all the more coercive by the suggestion that the two employees would be unable to secure work anywhere else (*supra*, p. 8).¹⁰ Almost all of these grants and promises of benefits were explicitly linked to requests that the employees concerned withdraw their support for the Unions.¹¹ As

¹⁰ The Board properly found Kubicki to be a supervisor within the meaning of Section 2(11) of the Act, since the Company conceded Kubicki's supervisory status in its answer to the complaint. (A. 7; 66, 74-79). In any event, Kubicki was clearly acting as an agent of the Company in connection with the meeting at bar, for as Kubicki testified (A. 213) and the Board found (A. 18), Kubicki arranged the meeting at the request of Glowacki, who asked him to probe Jachemczyk's and Mamelko's current attitudes toward the Unions. "If there is a connection between management and [an] employee's actions, either by way of instigation, direction, approval, or at the very least acquiescence, then the acts of the employee will be imputed to the Company." *N.L.R.B. v. Dayton Motels, Inc.*, 474 F.2d 328, 331 (C.A. 6, 1973). Accord: *N.L.R.B. v. General Metal Products Co.*, 410 F.2d 473, 475-76 (C.A. 6, 1969), cert. denied, 396 U.S. 830.

¹¹ Although Zajac granted Jachemczyk the wage increase on June 3 without expressly conditioning it on withdrawal from the Unions, the intent to discourage union adherence is clear. At the same time Jachemczyk was granted the increase, he was

(continued)

inducements to abandon the Unions, these promises and grant of benefits were clearly unlawful. "The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged." *N.L.R.B. v. Exchange Parts Co., supra*, 375 U.S. at 409-10. See also *N.L.R.B. v. Big Ben Department Stores*, 396 F.2d 78, 80-81 (C.A. 2, 1968).

C. Threats

The Board found, on the basis of ample evidence, that the Company violated Section 8(a)(1) of the Act by making numerous threats of plant closure and other reprisals and by otherwise indicating that the employees' attempt at self-organization was a futile act.¹² It is beyond dispute that remarks "conveying to . . . employees the futility of self-organization" are a violation of the Act. *N.L.R.B. v. Patent Trader, Inc., supra*, 415 F.2d at 198-99. Accord: *N.L.R.B. v. Fitzgerald Mills Corp.*, 313 F.2d 260, 268 (C.A. 2, 1963), *cert. denied* 375 U.S. 834. In this regard, Glowacki clearly violated Section 8(a)(1) when he told the employees on May 29 that they could forget about joining any union because he would never sign a union contract (A. 107), and again on August 18, when he told the four pro-union employees that "there will be no union in [this] shop" (A. 132).

¹¹ (continued) again questioned about his union sentiments. Coming as a response to his avowed support for the Unions, the increase was clearly designed to induce Jachemczyk to reconsider his views.

¹² The threats were made on five occasions: the May 29 meeting at the plant (A. 6-9), the August 18 meeting called to discuss the Union adherents' contract demands (A. 12-13), the remarks made by Brachocki to Jachemczyk on the day of the election (A. 14), the speech by Glowacki immediately following the election (A. 15), and Kubicki's conversation in the bar with Mamelko and Jachemczyk on August 28 (A. 18-19).

The Board properly found further violations in Company statements which suggested that those employees holding out for the Unions were putting their jobs on the line. *N.L.R.B. v. Gladding Keystone Corp.*, 435 F.2d 129, 130-31 (C.A. 2, 1970); *N.L.R.B. v. L. E. Farrell Company, Inc.*, *supra*, 360 F.2d at 207. Thus, Glowacki told the men at the May 29 meeting that the door was "open" for those who wished to join a union and they could "go with God" (A. 105). On August 23, just before the election, Brachocki told Jachemczyk that Palka would probably — and Mamelko might — be discharged after the election (A. 155). In his speech immediately after the election, Glowacki, directing his remarks to the union adherents, noted ominously that "you people will have to look for another job now" (A. 112).¹³ During Kubicki's discussion of the Unions with Jachemczyk and Mamelko in the local bar on August 28 (*supra*, p. 8), he strongly suggested that the two men could assure their job security only by withdrawing from the Unions; when they continued to affirm their union loyalties, he said "God help you," plainly implying that they would be given reason to regret their decisions (A. 212-13).

Finally, the Company violated Section 8(a)(1) of the Act through threats of plant closure. That the Company's statements regarding a "phasing out" of the business amounted to unlawful coercion under Section 8(a)(1), rather than free expression protected by Section 8(c) of the Act, is clear in the light of one of the Supreme Court's holdings in *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 617-20 (1969). Chief Justice Warren, writing for the Court, observed that an employer may properly predict "the precise effects unionization will have on his company," but added the following qualification:

¹³ Also at this meeting, Glowacki aimed an especially ugly remark at employee Palka by warning that he (Glowacki) would see to it that those who "left Poland illegally" would "never be able to see their families' graves again" (A. 15; 110, 133).

In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to *demonstrably* probable consequences *beyond his control* or to convey a *management decision already arrived at* to close the plant in case of unionization. See *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 274, n. 20, 85 S.Ct. 994, 13 L.Ed. 2d 827 (1965). If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. We therefore agree with the court below that "*[c]onveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof.*" 397 F.2d 157, 160. (*Id.*, 395 U.S. at 618-19 [emphasis supplied].)

It is evident here that the Company's warnings of plant closure were neither "carefully phrased" predictions based on objective facts nor announcements of a management decision already arrived at.

As noted below (pp. 33-34), the Company's claim that the Board of Directors voted on November 27 to close the Company down was simply a maneuver to avoid bargaining with the Unions, in view of the Company's negotiations with its individual employees in January and February of 1973 and the fact that it was still publishing at the time of the hearings before the Administrative Law Judge in March 1973 (A. 102). Since two of the plant closure threats were made before November 27¹⁴ and since subsequent

¹⁴ At the May 29 meeting at the plant, Glowacki told the employees that if a union came in, the Company would stay in business only three to six months longer (A. 216-17). In his speech to the employees immediately following the election on August 23, Glowacki asserted that those who voted for the Unions were responsible for the destruction of the "last Polish newspaper on the East Coast" (A. 110, 133).

events showed that "decision" to be a sham, the statements cannot qualify as assertions "conveying a management decision already arrived at."

The statements similarly fail to qualify as predictions of demonstrably probable economic consequences based on "objective fact." The plant closure threats mentioned above were made before the Company had even heard the Unions' bargaining proposals. Since the Company obviously could afford some increased employee benefits (see fact statement *supra*, pp. 12-13, regarding the offer made to its employees on an individual basis the following February), it could not possibly predict whether it could afford the least-expensive package it could get the Unions to agree to at the bargaining table until it had begun negotiations.¹⁵ That the Company's main concern was not the economic consequences of higher wage costs but simply what it considered to be the distasteful prospect of dealing with the Unions is made very clear by Glowacki's admission that when he met with the four pro-union employees on August 18 to discuss the contract demands which they announced as the price of their withdrawal of support for the Unions, he told them that he had "no authority to sign any contract with you and *especially if you are represented by the Union*" (A. 220) (emphasis supplied).¹⁶

¹⁵ If it were the case that the Company was financially much worse off in the summer and fall of 1972 than it was in the following February, it should have been able to prove this with books or records introduced at the hearing. Its failure to introduce such evidence gives rise to an inference adverse to such a contention, as well as to its claim that Glowacki's statements were accurate evaluations of the Company's financial position rather than threats to induce abandonment of the Unions. *Golden State Bottling Co., Inc. v. N.L.R.B.* ____ U.S. ___, 94 S.Ct. 414, 420 (1973); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 225-26 (1939); *N.L.R.B. v. A.P.W. Products Co.*, 316 F.2d 899, 903 (C.A. 2, 1963).

¹⁶ This statement reveals an attitude in sharp contrast to the attitude of the respondent in *N.L.R.B. v. River Togs, Inc.*, 382 F.2d 198 (C.A. 2, 1967), in which this Court found predictions of the effect of unionization not violative of the Act. There, the owner of the respondent garment company offered to recognize the union if a "union jobber" could be found who would pay a per-garment fee higher than those paid by the non-union jobbers with whom the company had previously dealt. 382

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In short, the talk of closing down the plant was simply a Company maneuver to discourage union adherence by making the employees fear for their jobs, and hence a clear-cut violation of the Act.

II. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCHARGING EMPLOYEE STEFAN JACHEMCZYK, LAYING OFF EMPLOYEES MICZYSLAW PAJAK AND ADAM PALKA, AND WITHHOLDING OVERTIME WORK FROM PALKA, PAJAK, AND MARION MAMELKO, BECAUSE THEY ENGAGED IN UNION ACTIVITIES PROTECTED BY THE ACT

A. The Layoffs

It is well settled that laying off employees because of their union sympathies violates Sections 8(a)(3) and (1) of the Act. *N.L.R.B. v. V. & H. Industries*, 433 F.2d 9, 10 (C.A. 2, 1970); *N.L.R.B. v. Diamond Standard Fuel Corp.*, 437 F.2d 1163 (C.A. 1, 1971); *N.L.R.B. v. Rubin*, 424 F.2d 748, 750-751 (C.A. 2, 1970). The Board found that the Company limited Pajak and Palka to one day of work per week from late August until approximately the middle of September, and that these partial layoffs were "motivated by antiunion considerations" (A. 18).

In determining that the layoffs violated Sections 8(a)(3) and (1), the Board properly considered the suspicious timing of the layoffs — the first one being announced immediately after the Unions won the election — as well as the Company's demonstration of its anti-union animus through the unfair labor practices it had committed before the layoffs. *N.L.R.B. v. Rubin*, *supra*, 424 F.2d at 750; *McGraw-Edison Company v. N.L.R.B.*, 419 F.2d 67, 75 (C.A. 8, 1969).¹⁷ Zajac's hostile remarks

¹⁶ (continued) F.2d at 201. *River Togs* is distinguishable also in that the owner quoted precise figures in discussing the company's ability to pay union benefits. *Id.*

¹⁷ The time at which the Company ended its practice of laying off Palka and Pajak for four days each week is also significant. As the Board noted, this occurred "immediately after Jachemczyk filed his unfair labor practice charge against the Respondent" (A. 18).

made to Pajak immediately after the election — *i.e.* Zajac's vow that he would no longer talk to Pajak, do favors for him, or give him a good recommendation "in case" he looked for another job (A. 111) — confirm the Company's discriminatory motives in the matter.

The Company has contended, however, that it did not violate the Act by temporarily laying off union supporters Palka and Pajak; rather, it has claimed it took this action solely in response to a decrease in available work. Concededly, whenever an "employer asserts a business justification for . . . layoffs, some basis for concluding that they were motivated *at least partially* by anti-union considerations must be shown." *N.L.R.B. v. M. H. Brown Co.*, 441 F.2d 839, 843 (C.A. 2, 1971) (emphasis added). Accord: *N.L.R.B. v. Rubin, supra*, 424 F.2d at 750. The Board concluded in the present case that "the contention that the layoffs were motivated by economic considerations is an incredible pretext to conceal the real reason for this conduct of the [Company]" (A. 18) and that, as shown above, the layoffs were motivated by antiunion sentiments (A. 18).

The Company's contention was supported only by the discredited testimony of Plant Manager Zajac, who stated that the layoffs were necessitated by a seasonal slowdown in business which the Company experiences each year during August and September. Yet Zajac conceded that such layoffs had never occurred in previous years during the alleged slack period and that no accounts had been lost during the period of the layoffs (A. 202). Moreover, the Company offered no records — either the sales journal which it admittedly maintained (A. 192) or other Company books — to substantiate its claim. Once again, an adverse inference may be drawn. *Golden State Bottling Co., Inc. v. N.L.R.B., supra*, 94 S.Ct. at 420; *Interstate Circuit Inc. v. United States, supra*, 306 U.S. at 225-26; *N.L.R.B. v. A.P.W. Products Co., supra*, 316 F.2d at 903. In addition, there is the fact that the Company had apparently not spoken to the employees of any expected seasonal slowdown until the layoff of Pajak was announced.

In short, the record amply supports the Board's conclusion that "the layoffs of Pajak and Palka, known union adherents, were motivated by antiunion considerations and that the [Company] thereby engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act." (A. 18).¹⁸

B. The Discharge

In determining whether the discharge of an employee is a discriminatory action aimed at discouraging union membership — and hence a violation of Section 8(a)(3) of the Act — the trier of fact does not simply look to see whether a valid ground for the discharge exists. Rather, "[t]he question the trier of fact must decide is whether the permissible reason is put forth as a mere pretext to justify an impermissible discharge, or whether the permissible reason is the true reason — in other words, whether an anti-union employee would have been discharged for the same conduct." *N.L.R.B. v. Milco, Inc.*, 388 F.2d 133, 138 (C.A. 2, 1968). Accord: *N.L.R.B. v. Advanced Business Forms Corp.*, 474 F.2d 457, 464 (C.A. 2, 1973); *N.L.R.B. v. Dorn's Transportation Co.*, 405 F.2d 706, 713 (C.A. 2, 1969). In the present case, the record amply supports the Board's finding that "the real reason for Jachemiczyk's discharge was his rejection of the [Company's] 'last chance' request that he abandon the Union" (A. 28).

¹⁸ The Board also concluded that another action by Company officials taken soon after the election results were announced violated Sections 8(a)(3) and (1) of the Act. This was the invitation extended by Glowacki to those voting against the Unions to join him at a nearby bar while the union adherents remained at work. Substantial evidence in the record supports the Board's conclusion that this incident took place (A. 110-11, 133); and the Company offered no explanation for limiting participation in this unusual "fringe benefit" to those who had opposed the Unions.

As shown in the fact statement (*supra*, pp. 5-6, 8), Jachemczyk had been the chief target of the Company's antiunion campaign — a campaign which featured a broad array of threats, promises, and interrogations, and which was continued even after the Unions won the election on August 23, apparently because the Company was under the impression that it could vacate the election results if it could induce at least one pro-union employee to withdraw from the Unions (A. 20 n. 29).

Jachemczyk continued to prove resistant to the Company's efforts at persuasion, however. Even when Foreman Kubicki, plying Jachemczyk and Mamelko with drinks at the local bar, offered them a last chance to withdraw from the Unions, Jachemczyk refused to alter his position. "God help you" was Kubicki's response (A. 213), and Jachemczyk's discharge followed in short order.¹⁹ The timing of this discharge — following directly on the heels of Jachemczyk's rejection of the Company ultimatum — properly led the Board to conclude that the Company was motivated at least in part by Jachemczyk's unshakeable union loyalty. *N.L.R.B. v. Advanced Business Forms, supra*, 474 F.2d at 465; *N.L.R.B. v. Long Island Airport Limousine Service Corp.*, 468 F.2d 292, 295 (C.A. 2, 1972); *N.L.R.B. v. Rubin, supra*, 424 F.2d at 750.

Before the Board, the Company contended that the proximate cause of Jachemczyk's discharge was his failure to appear for work on August 29, even when personally summoned by Foreman Kubicki. This incident, the Company claimed, was a last straw under which its years of compassionate tolerance for Jachemczyk's shortcomings as an employee

¹⁹ The interlude in the bar during which Kubicki was buying the drinks occurred on the evening of August 28, the night before Jachemczyk's failure to appear for work. Zajac testified that Kubicki told him that Jachemczyk was drunk when Kubicki went to summon him to work. The Board saw no reason to pass on the credibility of this hearsay testimony since the Company had tolerated Jachemczyk's overindulgence in alcohol for years, but it observed that "if Jachemczyk was drunk on August 29, the [Company] was at least partly responsible" (A. 25).

finally collapsed.²⁰ In addition, it was contended before the Board that the Company's "phasing-out" plans, supposedly forced on it by the Unions' victory, removed the justification for tolerating Jachemczyk's many faults as an employee any longer. He was merely being discharged sooner, rather than later, so the Company's logic goes. For a number of reasons, this explanation for the discharge of Jachemczyk cannot withstand scrutiny.

In the first place, there is no evidence in the record to suggest that Jachemczyk's discharge was linked to any plans to close down the plant. The reason given Jachemczyk in the letter of dismissal was his failure to show up for work on August 29 and his "history of frequent and unexcused absences" (A. 83); and Plant Manager Zajac explained the Company's action as a matter of finally getting "just fed up" (A. 199). Moreover, as the discussion, *infra*, pp. 33-34, indicates, it is in fact doubtful that any irrevocable decision to close down the plant was ever reached.

In the second place, since Jachemczyk's discharge occurred after the Company's antiunion animus had been made indisputably clear, the

²⁰ The Company could hardly deny that Jachemczyk's problems had never come to light until just before his discharge, since Plant Manager Zajac testified to particular incidents of tardiness going back to 1969 (A. 185-87) and to a long history of periodic intoxication, resulting occasionally in Jachemczyk's arriving at work with telltale breath, a red face, and "glazed" or "sparkling" eyes. He was also observed on these occasions "making funny noises" and "being very joyful when he's coming late." (A. 187-90). Foreman Kubicki testified to a fighting incident involving Jachemczyk and Palka which occurred in June 1971. This testimony not only establishes the Company's previous condonation of Jachemczyk's conduct but also justifies the Administrative Law Judge's refusal to permit testimony by two acquaintances of Jachemczyk, Stefan Bilicki and Stefan Bilicki, Jr., who, according to the Company's offer of proof, would testify to Jachemczyk's reputation for drunkenness and belligerence. Such testimony, even if relevant, would produce only cumulative evidence, so its exclusion could hardly be prejudicial. *Mak-All Mfg. Inc. v. N.L.R.B.*, 331 F.2d 404, 405 (C.A. 2, 1964); *N.L.R.B. v. Burroughs Corp.*, 261 F.2d 463, 467 (C.A. 2, 1958).

Board properly looked with some suspicion on the contention that the discharge had nothing to do with Jachemczyk's unshakeable support for the Unions. *N.L.R.B. v. Midtown Service Co.*, 425 F.2d 665, 670-71 (C.A. 2, 1970). The fact that the discharge also followed Jachemczyk's failure to report for work does not undermine the Board's finding in the matter since, as the record plainly shows, such absences had never been treated as a ground for discharge — or even suspensions — in the past. See *N.L.R.B. v. Midtown Service Co., supra*, 425 F.2d at 670; *N.L.R.B. v. Pembeck Oil Corp.*, 404 F.2d 105, 109-10 (C.A. 2, 1968), *vac'd and rem'd on other grounds*, 395 U.S. 828 (1969).

Finally, it should be observed that when Jachemczyk reported to work on August 30, he brought with him a note from his physician indicating that his absence the preceding day was owing to illness (A. 82, 159). The Company was, of course, not bound to accept the judgment of Jachemczyk's personal physician; but its refusal to attempt to verify Jachemczyk's claim by accepting his offer to submit himself to an examination by the Company physician suggests that the reason for Jachemczyk's absence played little if any part in the Company's decision to discharge him (A. 159-60).²¹ Rather, as the Board found, the Company's displeasure at Jachemczyk's absence on August 29 was only a pretext for accomplishing its real objective — to "eliminate the Unions' majority of one" (A. 27).²²

²¹ The Board's finding with regard to the Company reaction to Jachemczyk's medical excuse is based on Jachemczyk's testimony (A. 159-60), as are certain other findings concerning the discharge. While it is true that the Administrative Law Judge did not find Jachemczyk's testimony worthy of credence in every detail (A. 23 n. 34), the Board properly rejected the Company's contention that none of Jachemczyk's testimony should be credited whenever it conflicted with the testimony of another witness. See *N.L.R.B. v. John Langenbacher Co., Inc.*, 398 F.2d 459 (C.A. 2, 1968), cert. denied, 393 U.S. 1049.

²² The Board properly modified the Administrative Law Judge's Recommended Order by directing the Company to reinstate Jachemczyk's health insurance coverage
(continued)

C. The Denial of Overtime

As the fact statement, (*supra*, pp. 9-10) shows, the Board found that during the Christmas holiday season following the Unions' certification, the Company modified its practice, established in previous years, of giving a substantial amount of overtime work to all of its employees in order to provide larger paychecks for the holidays. Instead of dividing up the overtime equally, the Company gave the bulk of the overtime to the employees who had opposed the Unions and limited the pro-union employees to little or no overtime.²³ In its brief to the Board (p. 10), the Company attempted to explain the discrepancies by alluding to an overall reduction of overtime work supposedly made

²² (continued) and make him whole for any medical expenses suffered subsequent to his discharge, when his insurance was terminated because of the Company's unlawful discrimination against him. This remedy is in keeping with Board precedents. *Ramona's Mexican Food Products, Inc.*, 203 NLRB No. 102 (1973); *Ace Tank & Heater Co.*, 167 NLRB 663, 664-65 (1967). Moreover, courts have upheld such a remedy as a proper exercise of the Board's discretion. *N.L.R.B. v. Deena Artware, Inc.*, 228 F.2d 871 (C.A. 6, 1955), *enf'ing* 112 NLRB 371, 375 (1955); *N.L.R.B. v. Knickerbocker Plastic Co.*, 218 F.2d 917 (C.A. 6, 1955), *enf'ing* 104 NLRB 514, 516 (1953).

²³ The total overtime worked during the 8-week period preceding Christmas by Kubicki, Kabat, and Purij were, respectively 35-1/2 hours, 23 hours, and 40-1/2 hours. In the same period, Mamelko worked a total of 3 hours overtime, Palka, 7 hours, and Pajac received no overtime work at all (A. 31 n. 42 and 43; 257-65). This stands in sharp contrast to the same period in 1970, when the *weekly average* figures for Pajac and Mamelko were, respectively, 13-1/4 hours and 28 hours, and the figures for Kubicki, Kabat, and Purij were respectively 12-1/4 hours, 10-1/2 hours, and 13 hours. The figures for 1971 show Pajac and Mamelko to have been treated even better than the others: Pajac worked an average of 14-1/2 hours overtime per week, Mamelko an average of 18 hours; for Kubicki, Kabat, and Purij, the *weekly average* figures were 10-3/4 hours, 9 hours, and 5 hours (A. 30-31; 239-56). Palka did not begin work until the week ending November 12, 1971, but he averaged 7 hours overtime per week during the pre-Christmas period thereafter. Thus the large discrepancies in overtime assignments only appeared in the year in which the Unions came in.

necessary by the Company's purported plans to close the plant. The little overtime available, it contended, properly went to the employees who had been with it the longest. In fact, the record contains no evidence, other than the self-serving testimony of Plant Manager Zajac, that the Company's volume of business during the 1972 Christmas season was substantially lower than it had been in previous years. Moreover, the record contains no evidence that the longterm employees had ever been favored in previous years; indeed Mamelko had received by far the greatest amount of overtime in 1970.

Given the tenuousness of the record evidence supporting the Company's explanations for the blatant disparities in the assignment of holiday overtime work in 1972, together with the many other actions manifesting the Company's antiunion animus, the Board properly found that the Company's failure to assign overtime work to Pajak, Palka, and Mamelko in amounts comparable to those assigned the employees who had opposed the Unions constituted discrimination to discourage union membership and was thus a violation of Sections 8(a)(3) and (1) of the Act. *N.L.R.B. v. A & S Electronic Die Corp.*, *supra*, 423 F.2d at 222; *N.L.R.B. v. Buddy Schoellkopf Products, Inc.*, 410 F.2d 82, 86-87 (C.A. 5, 1969); *Textile Workers Union of America, AFL-CIO v. N.L.R.B.*, 388 F.2d 896, 902-903 (C.A. 2, 1967), cert. denied 393 U.S. 836.

III. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTIONS 8(a)(5) AND (1) OF THE ACT BY NEGOTIATING WITH THE UNIONS IN BAD FAITH, BY UNILATERALLY CHANGING TERMS AND CONDITIONS OF EMPLOYMENT WITHOUT NOTICE TO THE UNIONS, AND BY BARGAINING DIRECTLY WITH EMPLOYEES IN THE UNIT FOR WHICH THE UNIONS ARE THE JOINTLY CERTIFIED COLLECTIVE BARGAINING REPRESENTATIVES

A. The Company's Bad Faith Bargaining

Under Section 8(a)(5) of the Act it is an unfair labor practice for an employer "to refuse to bargain collectively with the representative of his employees" Collective bargaining is defined in Section 8(d) of the Act as "the mutual obligation . . . to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement" A refusal to bargain in good faith also coerces employees in the exercise of their rights under Section 7 of the Act "to bargain collectively through representatives of their own choosing"; hence such a refusal constitutes a violation of Section 8(a)(1) of the Act as well.

In *N.L.R.B. v. Patent Trader, Inc.*, *supra*, this Court set forth, the basic principles regarding good faith bargaining:

It is well-settled that the "performance of the duty to bargain requires more than a willingness to enter upon a sterile discussion of union-management differences."

N.L.R.B. v. American National Insurance, 343 U.S. 395, 402 (1952). And although "the obligation of the employer to bargain in good faith does not require the yielding of positions fairly maintained," *N.L.R.B. v. Herman Sausage Co.*, 275 F.2d 229, 231 (C.A. 5, 1960), more is required than mere "surface bargaining" or "giving the Union a runaround while purporting to be meeting the Union for collective bargaining." *N.L.R.B. v. Herman Sausage Co.*,

supra, p. 232, quoting *N.L.R.B. v. Athens Mfg. Co.*, 161 F.2d 8 (C.A. 5, 1947). See also *N.L.R.B. v. National Shoes, Inc.*, 208 F.2d 688, 691 (C.A. 2, 1953); *N.L.R.B. v. Fitzgerald Mills Corporation*, 313 F.2d 260, 266 (C.A. 2, 1963). Whether the Company bargained in good faith normally rests upon "a finding of motive or state of mind which can only be inferred from circumstantial evidence," *N.L.R.B. v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 139-140 (C.A. 1), cert. denied 346 U.S. 887 (1953), and "[t]he previous relations of the parties, antecedent events explaining behavior at the bargaining table, and the course of negotiations [which] constitute the raw facts for reaching such a determination." *Local 833, UAW-AFL-CIO, etc. v. N.L.R.B.*, 300 F.2d 699, 706, cert. denied; *Kohler Co. v. Local 833 etc.*, 370 U.S. 911 (1962). (*Id.*, 415 F.2d at 197)

In short, the Board properly bases its determination on the "totality of the circumstances." *N.L.R.B. v. General Electric Co.*, 418 F.2d 736, 756 (C.A. 2, 1969), cert. denied, 397 U.S. 965, rehearing den., 397 U.S. 1059.

In the present case, the "circumstances" provided ample evidence to support the Board's conclusion that the Company refused to bargain in good faith.²⁴ Before formal bargaining began, the Company had, as shown above, committed numerous unfair labor practices demonstrating its strong hostility toward the Unions. Of particular significance for a determination of the Company's attitude towards bargaining are Głowacki's comment at the May 29 meeting that the employees could "forget about" having a union since the Company would never "sign a union contract," (p. 4, *supra*) and his reassertion on August 18, when he met with the four pro-union employees, that there would be no union in the

²⁴ The Unions' status as the employees' statutory bargaining representative is established by the Board's September 11, 1972 certification (A. 6). The validity of that certification is not before the Court.

shop (p. 6, *supra*). These statements, coupled with the fact that the Company's unfair labor practices continued even after the Unions won the election indicate that the Company came to the bargaining table in October determined not to reach any kind of agreement with the Unions.

The Company's conduct at the bargaining table further demonstrated its bad faith. It learned of the Unions' proposals at the exploratory meeting in October, and at both that meeting and the first formal negotiating session in November, the Unions indicated a willingness to compromise on their initial demands (see fact statement *supra*, p. 10). Yet the Company failed to make a conciliatory move, offering no counterproposals of any kind.²⁵ This intransigent refusal to make any effort towards reaching agreement clearly indicates a lack of "good faith" bargaining. See *N.L.R.B. v. Reisman Bros., Inc.*, 401 F.2d 770, 771 (C.A. 2, 1968).

At the second and final negotiating session, the Company representatives forestalled all bargaining by announcing that no purpose would be served by further negotiations since a decision had been reached to go out of business. The Company contended before the Board that it was forced into this decision by economic considerations, and that it therefore had not violated Section 8(a)(5). However, no Company records were introduced at the hearing to support this claim of economic necessity. Moreover, even a showing of economic difficulties would not save the Company here. For, economic reasons put forward as the basis for a plant shutdown "must be honestly invoked, and . . . an employer may

²⁵ Indeed, as the Company explained in its brief to the Board (p. 15): "From the time of the election, it was made clear that it was felt that the Company could not afford a union contract, and there was never any change from this position . . . In spite of this situation, however, Respondent did not arbitrarily refuse to hear the union demands but rather listened to proposals as they were offered."

not attempt to disguise an anti-union motive by speaking the language of economic necessity." *N.L.R.B. v. Savoy Laundry, Inc.*, 327 F.2d 370, 372 (C.A. 2, 1964).²⁶

In the present case, the Company's conduct subsequent to the announcement that it would be shutting down its operations made it abundantly clear that this declaration was merely a ploy to avoid bargaining with the Unions. In the first place, it did not shut down as announced; at the time of the hearing before the Administrative Law Judge (March 12-13, 1973), the Company counsel conceded that the Company was still publishing (A. 102). Moreover, as discussed below, in February it negotiated with its own employees a contract providing increases in wages and other benefits — increases which, according to Glowacki's uncontradicted testimony it had never offered to the Union representatives (A. 228-29). Finally, according to the credited testimony of Pajak (A. 120) and Palka (A. 139), Glowacki told the employees during his negotiations with them in February that the Company had offers of contracts to print five books and would accept them if the employees would agree to withdraw from the Unions.²⁷

²⁶ Moreover, even if a company makes a lawfully motivated decision to close down, it is not relieved of all further obligation to bargain with the employees' bargaining representative since it is bound at least to negotiate the terms on which the employees will be terminated, *i.e.* such matters as which employees should be terminated first and what severance pay should be given. See *Cooper Thermometer, Inc. v. N.L.R.B.*, 376 F.2d 684, 688 (C.A. 2, 1967); *N.L.R.B. v. Royal Plating & Polishing Co.*, 350 F.2d 191, 196 (C.A. 3, 1965); *N.L.R.B. v. Rapid Bindery, Inc.*, 293 F.2d 170, 172, 176 (C.A. 2, 1961).

²⁷ A further indication that the Company had no fixed intention of closing down was its failure to follow up on a possible offer to buy its physical plant communicated by Seide, the representative of Pressmen's Local 51, to Glowacki. According to Seide's uncontested and credited testimony, he called Glowacki on February 5, 1973, and told him a man named Joseph Wolf who owned several printing plants would like to look over Czas with a view to buying it. After Seide conducted Wolf through the plant (by permission of the employees, no Company officers being present), Wolf told Seide the Company's principals should contact him if they were

(continued)

The Board thus had before it substantial evidence (1) that the Company had determined it would not reach agreement with the Unions before it ever heard their contract proposals, (2) that the Company made not the slightest effort to reach agreement with the Unions during the bargaining sessions, (3) that the Company was dealing with potential customers after it had told the Unions it was going to shut down, and (4) that the Company was financially able and willing to pay increased benefits to its employees so long as the Unions were out of the picture. On the record as a whole, the Board had substantial evidence that the Company violated Sections 8(a)(5) and (1) of the Act by refusing to bargain in good faith with the Unions.²⁸

B. The Unilateral Change in Terms and Conditions of Employment

It is well settled that an employer violates Section 8(a)(5) of the Act when he makes a unilateral change in conditions of employment

²⁷ (continued) interested in selling. Seide conveyed the message to Glowacki, but neither he nor Wolf ever heard anything more on the matter (A. 36-37; 100-102). (The Administrative Law Judge inadvertently substituted the name of Malewski, Company counsel, for that of Glowacki in recounting Seide's testimony, but this error does not change the bearing of the incident on the credibility of the Company's claim that it was closing down.)

²⁸ Before the Board, the Company cited *N.L.R.B. v. New England Web, Inc.*, 309 F.2d 696 (C.A. 1, 1962) as authority for its position that shutting down after a union is certified as bargaining representative is not an unfair labor practice if the company is in a deteriorating financial condition and a union contract would further aggravate its difficulties. *New England Web* is, however, distinguishable on numerous grounds. There was no history of animus against the union and the Trial Examiner found no independent unfair labor practices; the company put in evidence of many involuntarily lost contracts and made its books available at the hearing and the General Counsel did not dispute the figures; the company had announced definite plans for liquidation and was selling off its equipment; and at no time did it attempt to bypass the union and deal directly with the employees.

which he is bound to negotiate with his employees' collective bargaining representative, and that no finding of "a general failure of subjective good faith" is necessary to establish the violation. *N.L.R.B. v. Katz*, 369 U.S. 736, 743 (1962). Accord: *N.L.R.B. v. General Electric Co.*, *supra*, 418 F.2d at 746. Where there is substantial evidence that such a change is motivated by antiunion considerations, it also violates Sections 8(a)(1) and (3) of the Act. *N.L.R.B. v. McCann Steel Co.*, 448 F.2d 277 (C.A. 6, 1971); *N.L.R.B. v. Toffenetti Restaurant Co.*, 311 F.2d 219 (C.A. 2, 1962), cert. denied 372 U.S. 977.

Here it is undisputed that the Company cancelled the Christmas bonus which it had traditionally given its employees during past years, and that it did so without consulting with or giving notice to the certified Unions. Moreover, the cancellation occurred after the Company had committed many unfair labor practices revealing its animus against the Unions and just before it renewed its overt efforts to induce its employees to withdraw from the Unions.²⁹

The Company contended that it could not afford to pay the bonuses because it was going out of business; but as shown above (pp. 32-34) it was not in fact closing down, and as the Board noted "[i]t offered no records to support an inability to pay the bonus" (A. 45). Given these circumstances, the Board properly found that the cancellation of the Christmas bonus violated Sections 8(a)(1), (3) and (5) of the Act. *N.L.R.B. v. McCann Steel Co.*, *supra*; *United Steelworkers of America, AFL-CIO v. N.L.R.B.*, 405 F.2d 1373, 1375 (C.A.D.C., 1968).

C. The Company's Direct Bargaining with its Employees

An employer's duty under the Act to bargain collectively with the representatives chosen by his employees is an exclusive obligation, according to Section 9(a), and "it exacts 'the negative duty to treat with no

²⁹ See Section C, *infra*.

other.' " *Medo Corporation v. N.L.R.B.*, 321 U.S. 678, 683-684 (1944), citing *N.L.R.B. v. Jones & Laughlin Corp.*, 301 U.S. 1, 44 (1937). By refusing to bargain with the employees' lawful bargaining representative and instead attempting to bargain directly with members of the unit, an employer violates Sections 8(a)(5) and (1) of the Act. *Medo Corporation v. N.L.R.B.*, *supra*, 321 U.S. at 687. Accord: *N.L.R.B. v. Master Touch Dental Laboratories, Inc.*, 405 F.2d 80, 83 (C.A. 2, 1968). Moreover, as this Court has noted, "'*Medo* instructs that it does not matter who initiates the bypassing of the bargaining representative.'" *N.L.R.B. v. General Electric Co.*, *supra*, 418 F.2d at 755.

Here, as the fact statement has shown (*supra*, pp. 11-13), the Company not only bypassed the Unions and negotiated a contract with its individual employees, but also sought to condition the individually offered benefits on the employees' agreement to withdraw their support for the Unions. There is no question that such conduct violates Section 8(a)(5) and (1) of the Act. *N.L.R.B. v. A. E. Nettleton Co.*, 241 F.2d 130, 134 (C.A. 2, 1957).

CONCLUSION

For the reasons stated above, it is respectfully submitted that a judgment should issue enforcing the Board's order in full.

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March 1974

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD.

Petitioner,

V.

No. 74-1005

CZAS PUBLISHING COMPANY, INC.,

Respondent,

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above captioned case have this day been served by first class mail upon the following counsel at the addresses listed below:

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NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.

this 22nd day of March, 1974

